Supreme Court, U. S.
FILED
JAN 7 1980
MICHAEL RODAK, JR., CLERK

NO. 79-1066

IN THE

SUPREME COURT OF THE UNITED STATES

___ TERM, 19___

JEAN R. FUSELIER, SR.
Petitioner

v.

THE UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

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NO. 78-5612

IN THE
SUPREME COURT OF THE UNITED STATES
____ TERM, 19___

JEAN R. FUSELIER, SR., Petitioner
v.
THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, JEAN R. FUSELIER, SR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 2, 1979.

OPINION

The opinion of the United States Court of Appeals on original submission of the cause and on Petition for Rehearing appears in the Appendix hereof.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered

and delivered on November 2, 1979. A timely Petition for Rehearing was denied by order of the United States Court of Appeals for the Fifth Circuit on December 7, 1979. This petition was filed within 30 days of that date. This courts jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Whether a co-defendant coming forward while still under indictment, and exculpating the defendant, should have resulted in the granting of a Motion for New Trial?

STATEMENT OF THE CASE

This is an appeal of the affirmance by the United States Court of Appeals for the Fifth Circuit of a conviction by a jury and sentence and denial of motion for new trial from the United States District Court for the Southern District of Texas at Houston. On August 28, 1978, the jury found Jean R. Fuselier, Sr., defendant-appellant (hereinafter called defendant) guilty of one count of conspiracy to submit false claims, one count of conspiracy to defraud the United States, and sixty-three counts of submitting false claims to the United States. On September 13, 1978, defendant was sentenced

to several three year concurrent sentences, followed by several five year probated sentences running concurrently with each other and consecutive to the three year sentences.

On September 18, 1978, Joseph Probst, a co-defendant under indictment at that time, came forward and exposed that a conspiracy had existed to arrange for the defendant to be indicted for the conspirators' own personal gain. (See affidavit at page 15 of Appendix) This exculpating evidence resulted in defendant's motion for new trial being heard and denied by an order entered on April 20, 1979 (see page 23 of Appendix).

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on November 2, 1979, and petition for rehearing was denied on December 7, 1979.

REASONS FOR GRANTING THE WRIT

There is a substantial question as to whether a co-defendant coming forward while still under indictment, and exculpating the defendant, should warrant the granting of a motion for new trial. There is no case law existing on this point, and the only cases quoted by the District Court, the

U. S. Court of Appeals, and the United States Government, concerned witnesses coming forward with exculpating evidence while not under jeopardy themselves.

The opinion from the United States Court of Appeals for the Fifth Circuit, cites four cases with regard to the Motion for New Trial. The first cited case is U.S. v. Jones, 597 F.2d 485,488 (5th Cir. 1979), where the four prerequisites for considering a motion for new trial based on newly discovered evidence were set forth. The second two cased cited in the opinion, were U.S. v. Albert, 595 F.2d 283, 291 (5th Cir. 1979) and U.S. v. Johnson, 327 U.S. 106 (1945), and both of these cases concerned testimony that was given at trial and later contradicted. In the case on appeal, Joseph Probst did not testify at trial. Appellant's motion for new trial is based on Mr. Probst coming forward and exculpating the appellant while still under indictment himself. The last case cited in the opinion was Jackson v. United States, 353 F.2d 862, 865-66 (D.C. Cir. 1965), in which the appellate court reversed the trial court's conviction.

The Order from the District Court denying defendant's motion for new trial, which appears at page 23 of the appendix, clearly reflects that the trial judge made an erroneous finding of law when he followed cases applying to convicted co-defendant's and acquitted co-defendant's coming forward after trial with exculpating evidence. Mr. Probst was neither convicted nor acquitted, but under indictment at the time he came forward, and the trial judge erred in not granting appellant's motion for new trial.

The memorandum and order prepared by the District Court, denying defendant's motion for new trial, was stamped as being filed on March 23, 1979. The date the order was filed as stamped on the face of the order was some three weeks prior to the hearing of arguments on the motion for new trial, which took place on April 12, 1979. See the District Court's order at page23 of the appendix. See also volume 3 of the motion for new trial hearing at T3, L.1. for the date on which arguments on the motion for new trial were heard.

It appears from the date stamped for filing of this order, that the judge prepared his memorandum and order prior to even hearing the arguments by counsel on the motion for new trial.

In addition, the United States District Court judge issued the order to surrender on December 13, 1979, which appears in the appendix at page 30, when the mandate was not issued by the United States Court of Appeals until December 17, 1979, which appears at page of the appendix.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

DATED this the 28 day of December, 1979.

Respectfully submitted,

HEBERT & DUNNAM
Steve Hebert
2815 N. Main
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(713) 422-3553
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 1980, three copies of the petition for writ of certiorari were mailed, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C.

Steve Hebert

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5612
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JEAN R. FUSELIER, SR. Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas

(November 2, 1979)

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

PER CURIAM:

Jean R. Fuselier was convicted in the United States District Court for the Southern District Court for the Southern District of Texas on one count of conspiracy to defraud the United States, and 63 counts of submitting false claims to the United States. Five days after Fuselier was sentenced, Joseph Probst, a co-defendant still under indictment at that time, came forward and alleged that a

conspiracy had existed to frame Fuselier. Fuselier filed a Motion for New Trial, and on January 31, 1979, a hearing was held on that motion. The motion was denied by an order entered on April 20, 1979.

In this direct criminal appeal, Fuselier claims that: (1) the trial court's charge to the jury on the issue of intent was plain error; (2) the trial court should have excluded evidence discovered by the Government pursuant to a search warrant obtained on the basis of a tape recording taken from Fuselier's business premises by one of his employees; and (3) the trial court should have granted his motion for a new trial on the basis of newly discovered evidence, we affirm.

The Jury Charge

Fuselier objects now, although he did not object at trial, to the following jury charge:

> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

This instruction is reviewable for plain error. Fed. R. Crim. P. 30, 52(b); United

States v. McMahon, 592 F.2d 871, 877 (5th Cir. 1979). This instruction was specifically approved by this Court in United States v. Dunbar, 590 F.2d 1340, 1344 n.2 (5th Cir. 1979). Because the charge merely informed the jury that it was permitted to infer intent from the facts before it, there was no risk of instructing the jury to make an erroneous factual determination, as was the case in Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. ___, L.Ed. 2nd 39, 45 (1979). There was no error in the instruction.

The Fourth Amendment Claim

Fuselier's fourth amendment claim can be summarized as follows: (1) a warrant to search Fuselier's business premises, the AA Medical Sales Company, was issued based at least in part on records and materials taken from the business premises by an employee of AA Medical Sales Company and delivered by her to the Government; (2) the employee, Elizabeth Kessler, may have been acting as an agent of the Government at the time she took the records and materials for the sole purpose of turning them over to the Government;

(4) in either case the taking was a seizure within the fourth amendment; and (5) therefore the materials taken by Kessler, together with all evidence subsequently obtained by the Government pursuant to the search warrant, are subject to suppression.

After a hearing on Fuselier's motion to quash and suppress, the trial court found as a fact that: "At no time did any ex-employee of AA Medical Equipment act as an agent of the Government during the criminal investigation." The trial court also found as a fact that: "No individual connected with the United States Government encouraged, advised, or in anyway contributed to the taking of any documents from the two corporations by (Elizabeth Kessler)." These findings are supported by substantial evidence in the record and are not clearly erroneous. The trial court did not make any finding concerning Elizabeth Kessler's purpose in taking the records and materials from Fuselier's business premises. Even if Kessler had taken the records and materials for the sole purpose of turning them over to the Government, however, that single-minded

purpose would not, standing alone, transform her into an agent of the Government. United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975). The materials taken by Ms. Kessler, and the evidence obtained by the Government pursuant to the search warrant based on those materials, were not subejct to suppression under the fourth amendment.

The Motion for a New Trial

The Trial court recognized that in considering a motion for a new trial based on newly discovered evidence a court must determine whether a defendant has established four prerequisites:

> (1) That the evidence was in fact discovered after the verdict;
>
> (2) That the movant's failure to learn of this evidence was not due to any lack of diligence on his part;
>
> (3) That the evidence is material and not merely cummulative or impeaching; and
>
> (4) That a new trial would probably result in an acquittal.

See United States v. Jones, 597 F.2d 485, 488 (5th Cir. 1979). A court's denial of the motion for a new trial is reviewable

only for an abuse of discretion. See United States v. Albert, 595 F.2d 283, 291 (5th Cir. 1979). The scope of that review has been severely circumscribed by the Supreme Court:

> "it is not the province of . . . the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact."

United States v. Johnson, 327 U.S. 106 (1945). This is so even where the trial court's findsings concern the credibility of a witness, Jackson v. United States, 353 F.2d 862, 865-66 (D.C. Cir. 1965). In this case the trial court expressly found the testimony of Joseph Probst "to be deserving of no credibility whatsoever." It is thus apparent that Fuselier failed to show "that a new trial would probably result in an acquittal." The trial court therefore did not abuse its discretion in denying Fuselier's Motion for New Trial.

The judgment of the District Court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5612

U.S.Court
of Appeals
FILED
Dec. 7 1979
Gilbert F.
Ganucheau,
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JEAN R. FUSELIER, SR.,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(December 7, 1979)

Before AINSWORTH, FAY, RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ /s/ Randall
United States District Judge

THE STATE OF TEXAS X
COUNTY OF HARRIS X

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Joseph A. Probst, who is personally known to me, and first being duly sworn according to law upon his oath deposed and said:

My name is Joseph A. Probst; I am over eighteen (18) years of age, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

I am the same person referred to in United States of America vs. Joseph A. Probst; Criminal No. H-78-69S; In the United States District Court, Southern District ot Texas, Houston Division. I am personally acquainted with Jean R. Fuselier, Sr., Thomas J. Eastman, Rickie Carpenter, and Vickie N. Torres, who were also Co-Defendants in the above mentioned case.

On September 18, 1978, I telephoned Mr. Ronald J. Waska who I knew to be the

attorney representing Rickie Carpenter. I advised him that I wished to come to his office and to make a statement. I further advised that I did not wish to give this statement to my attorney or to any other person in the case except Ronald J. Waska. I advised him that I had first hand information that Rickie Carpenter, Jean Fuselier and Vickie Torres were innocent of all charges.

Mr. Waska advised me that he could not represent me as attorney since I already had an attorney of record, and therefore the information that I told him would not be privileged by the attorney-client relationship. He explained to me that he would be compelled to advise the United States Attorney's Office and the United States District Judge Seals of the information that I had conveyed to him. I agreed to allow him to do so.

I further advised Mr. Waska that I had on an earlier occasion appeared before a Federal Grand Jury. Becuase of the fear that I had for my safety I was unable to tell the Federal Grand Jury

the entire story. Although I am still in fear I cannot let Jean R. Fuselier be put in jail when I know that he is innocent of the charges. I am willing to testify in United States District Court if I am called upon and I will tell the whole truth so help me God that Jean R. Fuselier is innocent.

On approximately July 27, 1976, I went to work with AA Medical Equipment Company in Baytown, Texas. I was hired to deliver medical equipment to nursing homes. It was my understanding that Mr. Tommy Eastman had 49% ownership in the AA Medical Equipment Company and Jean R. Fuselier, Sr. had 51%. There was a disagreement between Mr. Eastman and Mr. Fuselier and in the winter of 1976 Jean Fuselier purchased Tommy Eastman's interest. After Jean Fuselier purchased Tommy Eastman's interest, Tommy Eastman came to me and asked me to continue working for Jean Fuselier but in reality I would be working for Tommy Eastman. He agreed to give me certain amounts of money at various times to provide him with information and equipment. It was my understanding that

Thomas J. Eastman was attempting to take over the business of Jean Fuselier. Thomas Eastman and George Kessler would pay me cash or on occasion cash was deposited directly into my bank account at Citizen's National Bank. For at least the next one year period of time I worked at the direction of Tommy Eastman, George and Beth Kessler, Beverly Rose and Linda and James Rice delivering information and equipment for the purposes of cheating Jean Fuselier, and to set him up on criminal charges. At the request of those indivuduals I delivered at least 75 chairs and other items to the home of Tommy Eastman. Usually George or Beth Kessler or Thomas Eastman would be present when I delivered the chairs. I don't know what they did with the chairs. I received money for the chairs. George and Beth Kessler on occasion promised me drugs in return for my cooperation in setting Jean up on criminal charges. In addition to providing wheel chairs I also provided information as to where Jean Fuselier would be at certain times during the week so that Tommy Eastman, George and Beth Kessler and

James and Linda Rice could enter the premises of Jean Fuselier in order to alter Medicare records. I also furnished a key to these individuals so that they could make a duplicate of it and have free access to Mr. Jean Fuselier's offices. I also on occasion at their request removed files from the offices of Jean Fuselier and delivered those filed to Thomas Eastman and Beth Kessler so that they could alter the files. They then returned the files to me and I replaced them in the offices of Jean Fuselier. On numberous occasions I spent the weekends water skiing and doing other recreational activities with Jean Fuselier and on those occasions I notified Tommy Eastman, George and Beth Kessler and James and Linda Rice that they had the free run of the premises of Jean Fuselier's in order to continue their activities. Around Christmas of 1977, I approached Tommy Eastman and George Kessler and asked them if I could terminate the relationship we had because I desired to get my life in shape. I had plans to be married in the near future. Present during this meeting

were Thomas Eastman, James Rice, George Kessler and two other very large individuals. George Kessler pulled a .38 pistol and held it against my head and told me "I only had one way to go." George Kessler told me that I was to continue doing the same things that they had requested of me earlier until they didn't need me anymore. George Kessler sturck me with his fist in the face and I have a small scar to this day. In my mind I had no other choice but to continue at their request. On one occasion, either Thomas Eastman or Beth Kessler asked me to pick up all the tapes in the offices of Jean Fuselier. I delivered between 10 and 15 tapes to Thomas Eastman's house. Only 2 of the tapes had Jean Fuselier's voice on them. All the tapes were burned by Thomas Eastman and George Kessler and James Rice except one tape that was felt to be incriminating as to Jean Fuselier. The majority of the tapes contained the voice of Thomas Eastman dictating to Beth Kessler. During this time, Thomas Eastman and he told me that he "didn't need me anymore". This meeting occurred at the

home of Thomas Eastman. As I was leaving George Kessler once again pulled a .38 pistol and reminded me that I should be a "good little boy and keep my mouth shut and he wouldn't put me in a pine box."

I believe that Alice Bounds and Beverly Rose were also involved in the conspiracy to take over Jean Fuselier's business. Both Beverly Rose and Alice Bounds were present during some of the meetings at the house of Thomas Eastman when I delivered equipment and relayed information. Beverly Rose was in charge of falsifying the inventory records to hide the missing equipment.

Jean Fuselier, Sr. is completely innocent of all charges in the captioned matter. I am convinced that he knew nothing about the actions of Thomas Eastman, George and Beth Kessler, James and Linda Rice, Alice Bounds and Beverly Rose.

/s/ Joseph A. Probst

SWORN TO AND SUBSCRIBED BEFORE ME, to certify which witness my hand and seal of

office, on this the 20th day of November, 1978.

/s/ Doris Foreman
Notary Public in and for
Harris County, Texas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. H-78-69-S

JEAN R. FUSELIER, SR.

FILED
April 20, 1979
V. Bailey Thomas,Clerk

MEMORANDUM AND ORDER

Presently pending before the Court is defendant's motion for a new trial. The defendant, Jean R. Fuselier, Sr., the past president of two medical equipment rental companies, was convicted of conspiracy and filing false claims with the Government after a one-month trial. After sentence was pronounced, defendant filed this motion and an evidentiary hearing was held.

In considering a motion for new trial based on newly discovered evidence, the Court must determine whether the defendant has established the four pre-requisites: "(1) that the evidence was newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence was material, not merely

cumulative or impeaching; (3) that it would probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendants." United States v. Rachal, 473 F.2d 1338, 1343 (5th Cir. 1973), cert. denied, 412 U.S. 927 (1973). See also United States v. Littlepage, 465 F.2d 63 (5th Cir. 1972); United States v. Crane, 445 F.2d 509, 519 (5th Cir. 1971); 2 C.Wright, Federal Practice and Procedure: Criminal Sec. 557 at 515 (1969).

Defendant's motion must stand or fall on the testimony of Joseph Probst. To the extent that any evidence presented at the hearing was material or probative of any issue, it was the "confession" of Probst that he and his compatriots defrauded the government and framed their employer. The Court concludes that the testimony of Joseph Probst does not warrant the granting of defendant's motion.

First, the Court, having observed the demeanor of the witness, finds Joseph Probst to be deserving of no credibility whatsoever. His behavior on

on the witness stand and his story itself lead the Court to discredit his testimony. Although "(a) credible confession by some third person that he and not defendant committed the crime in question is, if newly discovered, sufficient ground for a new trial," 2 C.Wright, Federal Practice and Procedure: Criminal Sec. 557 at 529 (1969), the Court is far from satisfied that the confession as an indictment. He testified that he was forced to remain in the conspiracy to frame by other, and the acts which he confessed, such as use of narcotics and theft, are not inconsistent with the defendant's guilt. The Court considers it highly unlikely that the existence of Probst's testimony would affect the verdict in the event of a retrial.

Second, it is not at all clear that Probst's testimony constitutes newly discovered evidence. There is no question that when a convicted co-defendant comes forward after trial and exculpates the movant, that this not considered newly discovered evidence. Such

exculpatory testimony is inherently suspect because the co-defendant has nothing to lose. See United States v. Rocco, 587 F.2d 144 (3rd Cir. 1978); United States v. Jacobs, 475 F.2d 270, 286 n.33 (2d Cir. 1973); United States v. Bujese, 371 F.2d 120 (3rd Cir. 1967); McAteer v. United States, 148 F.2d 993 (5th Cir. 1945). Additionally, when an acquitted co-defendant comes forward with exculpatory evidence, there is reason to find that evidence suspect. United States v. Coplin, 88 F.2d 652 (9th Cir. 1937). There are however, more reasons than the probative weight of the exculpatory evidence which justify holding that it is not newly discovered. One court has held that the privilege against self-incrimination may not be used offensively after a trial of one of the co-defendants, and this principle applies equally without regard to the jeopardy of the witness. In Coplin v. United States, supra, the court stated:

> We confess that we are not impressed with this eleventh-hour showing on behalf of (the movant). The attempt is made to explain these affidavits as having been made necessary by the fact that these witnesses could not have testified unless they took the stand in their own

defense. which they elected not to do. They were, of course, quite within their rights in making that election. Their privilege to remain silent during the trial, however, was a shield and not a sword; the defendants can hardly use such silence as a basis for overturning the verdict of the jury.

We are not here dealing with newly discovered evidence. The affiants knew the alleged facts at the time the trial commenced. They chose to stay off the stand and to take the chances of an acquittal without having to testify. After the verdict was returned, they suddenly became active on behalf of one of the convicted defendants.

Id. at 665.

The Court is aware of no case in which a motion for a new trial was granted because of exculpatory testimony given by a co-defendant whether or not the co-defendant was in jeopardy.

Third, to the extent that Probst's testimony was related to issues material to the defendant's convictions, it was merely impeaching. Several government witnesses were cross examined at the trial and they testified that they did not "frame" the

defendant. In addition, the evidence also is cumulative; the jury was confronted with the theory that someone had conspired to frame the defendant and they rejected that theory. The defendant claims that he did not know how he had been framed until Probst came forward, even though he concedes that he knew that it had been done and by whom. When it is considered that most of the counts related to the preparation and submission of false claims, little of Probst's testimony disclosed much about how this could have been done which was not readily apparent. The Court was aware throughout the trial that the defendant professed that he had been framed. Probst's testimony was merely cumulative evidence on a theory that had been considered at trial.

The testimony of the other witnesses was not of the nature which makes it probable that their testimony would lead to a different verdict in the event of a retrial. Several of the other witnesses actually testified at trial and that testimony of the others certainly was

available.

The defendant has failed to demonstrate the existence of newly discovered evidence which would justify a new trial. For the reasons stated above, the Court hereby ORDERS:

Defendant's motion for a new trial is DENIED.

The Clerk shall file this Memorandum and Order and shall provide counsel for all parties with a true copy.

Done at Houston, Texas, this 20th day of April, 1979.

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
DIVISION

UNITED STATES OF AMERICA

V.

JEAN R. FUSELIER, SR.

CRIMINAL NO. H-78-69-S
Filed
Dec. 13, 1979
V.Bailey Thomas, Clerk

ORDER TO SURRENDER

It is hereby ordered that Jean R. Fuselier, Sr., the defendant, having been sentenced in the above case to the custody of the Attorney General, is hereby ordered to surrender himself to the Attorney General by reporting to Federal Prison Camp, Big Springs, Texas at 3:00 P.M. on 1-3-80.

12/13/79
DATE

/s/ Woodrow Seals
UNITED STATES DISTRICT JUDGE

Acknowledgment:

I agree to report as directed in this order and understand that if I fail to do so I may be cited for contempt of court and if convicted of contempt may be punished by imprisonment or fine or both.

/s/ R. E. Liman
Witness

/s/ Jean R. Fuselier, Sr.
Defendant

TRUE COPY I CERTIFY
ATTEST:
V. BIALEY THOMAS, CLERK
by: /s/ J. Ketelser
Deputy Clerk